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No. 86-347

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DANTE GRASSI & DOMINIC SANTARELLI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONERS

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The United States, in its brief in opposition, does not contest the importance of the issues raised here by petitioners or deny that the circuits are in conflict on those issues. Indeed, with respect to one of these issues, it was barred from making any such argument by the fact that the Court has recently granted review in a case involving that very issue. *See Bourjaily v. United States*, 781 F.2d 539 (6th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3257 (U.S. Oct. 14, 1986) (No. 85-6725). Instead, the focus of respondent's brief is an effort to show that the present case does not actually raise the issues

we have put forward for review. Because this effort is unavailing, the Court should grant review or, at minimum, hold the case pending the outcome in *Bourjaily*.

1. The first issue addressed by the United States is whether admissibility of a hearsay statement under a "firmly rooted" hearsay exception is *automatically* sufficient to eliminate Confrontation Clause concerns—*i.e.*, without any judicial examination of the reliability of the particular statement at issue. As we noted in our petition, this Court in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), stated that "[r]eliability *can* be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." (Emphasis added.) As we further noted, the circuits are split on whether this inference of reliability should be made in all cases or only where the particular circumstances are consistent with a finding of reliability. Pet. 14-16.

Respondent, however, suggests that this is not an open question with respect to statements admitted under any hearsay exception other than the co-conspirator hearsay rule in Fed. R. Evid. 801(d)(2)(E). In its view, the unresolved issue raised in *Bourjaily*, *supra*, is not the mandatory or permissive nature of the *Ohio v. Roberts* inference of reliability, but simply whether co-conspirator statements are among the "firmly rooted" hearsay exceptions covered by that inference. Because the present case involves not co-conspirator statements but another form of hearsay, respondent argues that *Bourjaily* and the underlying conflict among the circuits have no relevance to this case.

The flaw in this argument is that it mischaracterizes the decisions of the lower courts in this area, as well as the issues likely to be discussed and decided in *Bourjaily*.[1] While there have been a few lower-court cases

[1] The relevant question presented in *Bourjaily* is "Whether, as a requirement for the admission of a co-conspirator's statement

that do focus on whether the co-conspirator rule is "firmly rooted," [2] the more fundamental issue—*i.e.*, the proper application of *Ohio v. Roberts* to *any* kind of admissible hearsay—is also an open question. Co-conspirator cases are certainly the most common type in this area.[3] But even in cases involving *other* types of hearsay admissible under other exceptions, the circuits are split on the relationship between admissibility and reliability under the Confrontation Clause. Some courts have agreed with the decision below and equated reliability with admissibility under the rules of evidence, *see, e.g., Barber v. Scully*, 731 F.2d 1073, 1075 (2d Cir. 1984), while others have seen a need to undertake an independent review of reliability in order to satisfy the Sixth Amendment, *see United States v. Young*, 736 F.2d 565, 569 (10th Cir. 1983), *rev'd on other grounds*, 470 U.S. 1 (1985); *United States v. Johnson*, 735 F.2d 1200, 1203 (9th Cir. 1984); *Williams v. Melton*, 733 F.2d 1492, 1495-96 (11th Cir.), *cert. denied*, 105 S. Ct. 567 (1984);

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against a defendant, the court must assess the circumstances of the case to determine whether the statement carries with it sufficient indicia of reliability." 55 U.S.L.W. at 3257 (October 14, 1986). This question is broad enough to encompass both the issue presented in our petition and the alternate version suggested by respondent.

[2] *See United States v. Massa*, 740 F.2d 629, 639 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985); *United States v. Ammar*, 714 F.2d 238, 255 (3d Cir.), *cert. denied*, 464 U.S. 936 (1983). These cases take note of the fact that co-conspirator statements are technically admitted as "non-hearsay" under Fed. R. Evid. 801, rather than as a hearsay exception under Fed. R. Evid. 803 or 804. This Court, however, has recently noted that this distinction has no real meaning in the Confrontation Clause context. *United States v. Inadi*, 106 S. Ct. 1121, 1128 n.12 (1986).

[3] The preponderance of co-conspirator cases, we submit, is largely a result of the fact that this particular type of hearsay is the most commonly used, in criminal prosecutions. *See United States v. Inadi*, 106 S. Ct. 1121, 1128 (1986).

United States v. Katsougrakis, 715 F.2d 769, 776 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).[4]

Respondent's effort to limit the *Bourjaily* case to co-conspirator hearsay is especially difficult to understand in light of the position adopted just last Term by the four dissenting justices in *Lee v. Illinois*, 106 S. Ct. 2056 (1986)—a position which we discussed in some detail in our petition but which the United States does not even acknowledge. *Lee* did not involve the type of co-conspirator's statement admissible under Fed. R. Evid. 801(d)(2)(E), since the statement at issue, a co-defendant's confession, could not be characterized as made "during the course and in furtherance of" a conspiracy. Instead, the state sought to justify the admission of this statement under the hearsay exception for "declarations against penal interest." Justice Blackmun, dissenting for himself and three other Justices, argued that the admission of this statement did not violate the Confrontation Clause. In so doing, he began with the proposition that the "hearsay exception for declarations against interest is firmly established."[5] 106 S. Ct. at 2068. But, far from arguing that this ended the Sixth Amendment issue, he noted that "the requirements of the Confrontation Clause and the hearsay rule often diverge," *ibid.*, and proceeded to analyze the particular factual circumstances for several pages before conclud-

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[4] *See also United States v. McKinney*, 707 F.2d 381, 383-84 (9th Cir. 1983) (*dictum*) (independent determination required); *Stevens v. Bordenkircher*, 746 F.2d 342, 348 (6th Cir. 1984) (*dictum*) (same); *United States v. Vretta*, 790 F.2d 651, 660 (7th Cir.), *cert. denied*, 107 S. Ct. 179 (1986) (independently assessing the reliability of a statement admitted under the "catch-all" hearsay exception of Fed. R. Evid. 804(b)(5)).

[5] Because the majority disagreed with this proposition, 106 S. Ct. at 2064 n.5, it did not reach the issue of the significance of admissibility under the hearsay rules for purpose of the Confrontation Clause.

ing that the statements were sufficiently reliable to pass constitutional muster.

In light of the *Lee* dissent, and the other cases cited above, it is simply indefensible for the United States to suggest that there is no doubt about the relationship between admissibility and reliability for statements admitted under exceptions other than the co-conspirator exception. In *Bourjaily*, the Court will in all likelihood be deciding that very issue—*i.e.*, when, if ever, admissibility under any hearsay exception is a proxy for separate constitutional scrutiny. For that reason, the Court should at minimum hold this case pending the outcome in *Bourjaily*.

2. The other Sixth Amendment issue raised in our petition involved the Eleventh Circuit's alternative holding that all Confrontation Clause concerns are eliminated if the prosecution makes the out-of-court declarant available to the defense to be called as a defense witness. This, the court held, is the functional equivalent of providing the defense an opportunity to cross-examine the declarant at the time the statement is first introduced. As a result, under the holding below, there was no need for further analysis, under *Ohio v. Roberts*, of the *reliability* of the hearsay statements or the *unavailability* of the declarant as a prosecution witness. Here again, as we demonstrated, the court's holding conflicts with that of several other circuits. Pet. 11.

The Government's response on this issue is wholly insufficient. It relies primarily on two cases—*Ohio v. Roberts* and *United States v. Inadi*—neither of which can possibly be said to resolve the issue at hand. Opp. 10 n.4. At no time, other than in a footnote in the *Lee* dissent discussed in our petition, at page 10, has this Court suggested that an opportunity to call a witness is a sufficient substitute for cross-examination so that all

Sixth Amendment challenges to hearsay evidence are ended.[6]

3. Finally, we note that the United States has failed to answer the heart of our claims with respect to the admission of testimony linking petitioners to organized crime. The problem we raise is the danger that an alleged victim in a Hobbs Act case will have received information about the defendant from some third party, and interpreted the defendant's innocent conduct as extortionate because of this extrinsic information. The solution, we submit, is to require a prior showing that the defendant was aware of, and thus could have exploited, the information about his reputation that was made known to his alleged victim.

Faced with this problem, it is not enough for the respondent to argue that the defendants' conduct was "consistent with" the information received from third parties linking them with organized crime. Opp. 11. Their conduct was also, presumably, "consistent with" many other possible descriptions of their character that the alleged victims *might* have received. What the Government should be required to show, before introducing third-party statements characterizing the defendants as members of organized crime, is that the defendants were aware that they were so perceived by the alleged victims, and thus could have made improper use of this perception. No such showing was made here.

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[6] In *Inadi*, the Court and the dissenters indicated that the defendant remained free to challenge the reliability of the out-of-court statements. *See* Pet. 12 n.9.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, the case should be held pending the outcome in *Bourjaily*.

Respectfully submitted,

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